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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CASSIMIRR AUGELLO, ALSO KNOWN AS CASEY AUGELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No.

In The

Supreme Court of the United States

October Term, 1966

CASSIMIRR AUGELLO, Also Known as CASEY AUGELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Cassimirr Augello, also known as Casey Augello, your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on November 4, 1966.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey is set forth in Appendix A hereto, infra, page 6.

The opinion of the Court of Appeals for the Third Circuit is printed in Appendix A hereto, infra, page 6.

JURISDICTION.

The opinion of the Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the District of New Jersey was filed on November 4, 1966.

The jurisdiction of this Court is invoked under 28 U. S. Code § 1254 (1).

QUESTIONS PRESENTED.

1. Whether within the meaning of 18 U. S. C. § 3109 the standards set down in *McClure* vs. *United States*, 332 F. 2d 19 (9 Cir. 1964) which involved narcotics are equally applicable to the present case involving bookmaking.

2. Whether within the meaning of 18 U. S. C. § 3109, standards set down involving violent or perniciously dangerous offenses are equally applicable in non-violent cases.

STATUTES INVOLVED.

The following statutes are set forth in Appendix B, infra, page 10:

18 U. S. C. 3109
26 U. S. C. 7262

STATEMENT OF THE CASE.

On June 4, 1964, a search warrant was issued by U. S. Commissioner Charles Rudd authorizing a search of premises in which petitioner resided.

On June 11, 1964, some eight Federal Agents (the Circuit Court Opinion indicates five) entered the premises.

The United States District Court for the District of New Jersey later found that the front screen door was locked but the solid door behind it was open; that one of the agents announced himself and requested the door be opened; that petitioner's sister called out "Casey, Casey" whereupon one of the agents put the heel of his hand through the screen, lifted the latch and entered the living room.

The Court found that the time between the arrival of the agents at the door and entry was about five (5) seconds.

The search that followed revealed paraphernalia essential to the Government's case.

On December 29, 1964, a three count information was filed against Petitioner charging that the defendant engaged in the business of accepting wagers and was liable for the tax imposed by 26 U. S. C. § 4401 and

I. did fail to pay the tax
II. did wilfully fail to pay the tax
III. did wilfully fail to supply registration information (26 U. S. C. 4412)

On January 15, 1965, Petitioner pleaded not guilty to all counts and on February 12, 1965 moved to suppress the evidence obtained in the search on the ground that execution of the search warrant was unreasonable.

On July 13, 1965, a hearing was held on the motion to suppress and the motion was denied by the United States District Court for the District of New Jersey.

On September 15, 1965, defendant waived trial by jury in the United States District Court and was tried before the Honorable Thomas M. Madden, Chief Judge.

On March 4, 1966, the Court found the defendant guilty on Count I of the information—failure to pay a special tax on wagering operations in violation of 26 U. S. C. § 7262. He was acquitted on Counts II and III.

On April 1, 1966, defendant was sentenced to pay a fine of $3,000.00.

On April 11, 1966, defendant-petitioner appealed to the United States Circuit Court of Appeals for the Third Circuit which heard argument on October 7, 1966.

On November 4, 1966, the judgment of the United States District Court for the District of New Jersey was affirmed.

The filing of this Petition followed.

REASON FOR GRANTING THE WRIT.

The question raised here is the interpretation of "refused admittance" in 26 U. S. C. § 3109.

The Court of Appeals stated that the present case is indistinguishable from *McClure* vs. *United States,* 332 F. 2d 19 (9 Cir. 1964).

We agree that in both *McClure* vs. *United States* and the instant case, the time elapsed between the officers' arrival at a door and entry was about 4 or 5 seconds. In the *McClure* case, however, we are dealing with the perniciously dangerous matter of narcotics and the danger of destruction of evidence.

In the instant case, the number of agents involved, the non-violent nature of the matter and the fact the petitioner-appellant had no previous record would seem to indicate that an entry in 5 seconds was not reasonable. The instant case does not seem comparable to the *McClure* case.

This Court in *McDonald* vs. *United States,* 335 U. S. 451 stated that suppression of non-violent enterprises should not be viewed as more important than protection against unreasonable search and seizure.

The Third Circuit Court itself has indicated that such swift entry would be allowed only where exigent circumstances were shown.

United States of America, ex rel, Richard J. Manducci vs. *Jack Tracy, Warden*, 350 F. 2d 658 (1965) (3 Cir. 1965).

CONCLUSION.

For the reason stated it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

PATRICK T. MCGAHN, JR.

APPENDIX A.

Opinion of the United States District Court for the District of New Jersey:

The Court: The Court finds, under all of the facts and circumstances here, that the defendant was during the month of June, 1964, in Atlantic City, engaged in the business of accepting wagers without having the special occupational tax stamp, and, consequently, he is guilty under the first count of the indictment.

The Court does not find the element of wilfulness or proof of the element of wilfulness present which is necessary to convict him under counts Nos. 2 and 3 of the information, and, consequently, the defendant stands acquitted on those two charges.

Opinion of the United States Court of Appeals, Third Circuit:

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 15922.

UNITED STATES OF AMERICA.

vs.

CASSIMIRR AUGELLO, ALSO KNOWN AS CASEY AUGELLO,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued October 7, 1966.

Before FORMAN, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT.

(Filed November 4, 1966.)

By FORMAN, *Circuit Judge.*

Appellant Cassimirr "Casey" Augello, after waiver of trial by jury in the United States District Court for the District of New Jersey, was convicted of one count of a three count indictment charging him with failure to pay a special tax on wagering operations in violation of 26 U. S. C. § 7262. The principal ground of error asserted is that the District Court erred in failing to suppress evidence seized during the execution of an arrest warrant and search warrant in alleged violation of 18 U. S. C. § 3109.

Agents of the Internal Revenue Service received information from a reliable confidential informant that the appellant was operating a large bookmaking establishment in his home in Atlantic City, New Jersey. In the two months preceding the issuance of the warrants, a special agent and the confidential informant had placed wagers by calling a phone number listed at appellant's address. Investigation showed that no tax returns or regulation applications had been filed by the appellant or anyone else at that address. On this basis warrants for the arrest of the appellant and for the search of the premises were issued on June 4, 1965.

At approximately 2:30 p. m. on June 11, 1965, five agents of the Internal Revenue Service arrived by car in front of appellant's home. They ran from the automobile, three going to the front door and two to the side door. At this time the appellant's sister and mother were watching television in the living room in the front of the house. Though there was conflicting testimony, the District Court found that the front screen door was locked, but the solid door behind it was open, and that when Agent Sullivan approached the front door he could see directly into the living room where the two women sat. Agent Sullivan gave "a few raps" and said "Federal Officers with a search war-

rant. Open the door." Thereupon appellant's sister stood up and called "Casey! Casey!" and started toward the rear of the house. Agent Druiz tried to open the screen door and found it locked. Supervising Agent Cairone said, "Break it!" Agent Druiz put the heel of his hand through the screen, reached in, lifted the latch, whereupon the agents entered. The time between the arrival at the door and their entry was about four or five seconds. They proceeded down the hallway toward the rear of the house, and found the appellant in the kitchen. The agents thereupon informed appellant that they were federal agents with a warrant for his arrest. Within the next two or three minutes appellant was formally arrested.[1] Substantial incriminating evidence was obtained as a result of the search.

The relevant statute is 18 U. S. C. § 3109 which provides as follows:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant."

The fact that an arrest warrant is also involved here has no special significance since the validity of entry under an arrest warrant is to be tested by standards identical to those in the above statute.[2] Thus we are concerned with three statutory requirements: (1) announcement of authority, (2) announcement of purpose, and (3) refusal of admittance. Since the District Court's specific finding that the first two announcements were made, may not be disturbed, it remains only to consider whether the officers were "re-

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[1] Certain statements taken from the appellant after his arrest were excluded from evidence by the District Court upon a finding that he was not informed of his rights when placed under formal arrest. These are not involved in the present consideration.

[2] McClure v. United States, 332 F.2d 19 (9 Cir. 1964) (assumed without discussion); Sims v. United States, 231 F. Supp. 251 (D. Md. 1964); United States v. Barrow, 212 F. Supp. 837 (E.D. Pa. 1962).

fused admittance." Such refusal is present where it can reasonably be inferred from the actions or inaction of the occupants of the premises to be searched.[3] In *McClure* vs. *United States*,[4] several officers with probable cause to believe the appellant was trafficking in heroin and with appropriate warrants went to the front and rear doors of the premises to be searched. The officers, some with guns drawn, proceeded to the front door, passing a bay window, and as they did so, were observed by the mother of the appellant. One of the agents testified that she began to run. Upon reaching the front door, the agent beat upon it and shouted "We are federal officers and have a search warrant, open up." He then heard footsteps running in the "wrong direction," whereupon he kicked open the door to obtain entrance. The total time between arrival at the door and entry was four or five seconds. The Court validated the legality of the search and commented as follows:

> ". . . The refusal of admittance contemplated by the statute will rarely be affirmative, but will oftentimes be present only by implication. . . . When [the officer] heard footsteps 'running in the wrong direction' he had grounds to believe that his request had been rejected. This is especially so since he had previously noticed one of the occupants of the house begin to run. There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case. But officers are never required to wait until the occupants have flown and thus render a search unavailing and an arrest impossible. We think the circumstances were such as would convince a reasonable man that permission to enter had been refused."[5]

We think that this passage expresses a correct view of the requirements of the statute and that the present case is

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[3] McClure v. United States, note 2 *supra;* Masiello v. United States, 317 F.2d 121 (D.C. Cir. 1963).

[4] Note 2, *supra.*

[5] 332 F.2d at 22.

indistinguishable from *McClure*. When, after making their announcement, the officers saw the appellant's sister running away from the door and calling the name of the very person for whose arrest they possessed a warrant, they were justified in making an immediate entry. Thus the District Court was not in error in denying appellant's motion to suppress.

The appellant also makes a claim that the search was invalid because the appellant was not warned of his rights at the time of his arrest. But the search was conducted pursuant to a valid search warrant, and the District Court in fact excluded from evidence all statements of the accused made after his arrest. The judgment of the United States District Court for the District of New Jersey will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

18 U. S. C. 3109:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant."

26 U. S. C. 7262.

Violation of occupational tax laws relating to wagering—Failure to pay special tax:

> "Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000.00 and not more than $5,000.00. August 16, 1954, 9:45 a. m., E. D. T., c. 736, 68A, Stat. 862."